Hercules Engineering (SEA) Sdn Bhd v Naim Engineering Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NOS WA-12BC-7–12 OF 2021 AND WA-B52C-28–08 OF 2020
ALIZA SULAIMAN J
29 DECEMBER 2023

Civil Procedure — Pleadings — Failure to plead — Failure to plead issue of 'waiver' in statement of claim — Whether material facts pleaded

Contract — Claims — Claim for work done — Claim based on quantum meruit — Waiver of strict requirements under contract on variation procedure — Sessions court dismissed appellant's claim for additional works based on quantum meruit — Whether respondent instructed appellant to carry out additional works — Whether appellant had carried out additional works — Whether respondent verified and approved additional works carried out by appellant — Whether respondent agreed that rates for additional works were to be calculated proportionately — Whether respondent acquiesced to appellant's claim for additional works — Whether absence of written instructions, authorisations or approvals fatal — Whether respondent had waived strict requirements under contract on variation procedure — Whether there was implied promise on the part of respondent to pay for additional works — Whether additional works lawful — Whether additional works were done for respondent — Whether additional works were not intended to be done gratuitously — Whether appellant incurred costs in carrying out additional works which benefitted respondent — Whether appellant entitled to its claim based on quantum meruit — Contracts Act 1950 s 71

The parties in the present appeal were both contractors. Via a letter of acceptance dated 13 January 2014 ('the LOA'), the respondent appointed the appellant as the sub-contractor for the supply, delivery, testing and installation of laminated elastomeric bearing pads ('the original works'). The appellant had completed the original works within the prescribed time of 12 months. Apart from the original works, the appellant had also completed the additional works to cast additional thickness of high strength shrink levelling grout ('the additional works'). Despite the completion of both the original works and the additional works, the respondent had only made part payment for the original works and failed to pay for the additional works, hence, the appellant's action against the respondent in the sessions court. The appellant contended that the respondent had benefitted from the additional works, as such, the appellant was entitled to be paid the claimed amount or any other reasonable amount on

the basis of *quantum meruit*. The respondent disputed the appellant's claim for the additional works on the grounds, inter alia, that there were no written instructions, authorisations or approvals for the purported additional works as contractually stipulated. Specifically, the respondent argued that the appellant failed to prove that it had obtained oral instruction from Mohd Zulfikri bin Ghazali, the respondent's site engineer ('Zulfikri'). Therefore, the respondent submitted that the appellant was not entitled to any sums based on *quantum meruit*. In support of its claim, the appellant relied on the following contemporaneous documents: (a) the appellant's quotation to the respondent dated 7 June 2013; (b) email dated 8 February 2014; (c) 'Verification of Work Done/Variation Order Work Done Form and Inspection & Test Plan: Installation Of Elastomeric Bearings Form'; (d) emails dated 5 May 2015, 5 September 2015, 10 September 2015, 14 January 2016, and 16 January 2017; (e) meeting on 27 January 2017 and letter dated 31 January 2017; and (f) letter of demand dated 28 May 2020 (collectively referred to as 'the contemporaneous documents'). The sessions court judge ('the SCJ') dismissed the appellant's claim for the additional works amounting to RM293,182.52 based on, inter alia, the following findings: (i) the appellant failed to comply with the variation procedures as set out in cll 34 and 35 of the LOA; (ii) the appellant failed to prove that it had obtained oral instruction from Zulfikri to carry out the additional works and due to the non-calling of Zulfikri as a witness at the trial, the court invoked s 114(g) of the Evidence Act 1950; and (iii) no determination could be made on the issue of waiver ie, that the respondent had, by its conduct, waived the strict requirements under the LOA on variation procedures or had admitted the additional works and promised to pay for the same, as this was not pleaded by the appellant ('the pleadings issue'). Aggrieved by the decision, the appellant filed the present appeal.

Held, allowing the appeal with costs of RM15,000 here and below to be paid by the respondent to the appellant, subject to allocatur:

(1) If the SCJ had properly analysed and appreciated the contents and significance of the contemporaneous documents, she would have found that these documents were not promptly and vigorously denied or challenged by the respondent at all material times, and that the evidence adduced by the appellant proved that the respondent had: (a) instructed the appellant to carry out the additional works; (b) verified and approved the additional works carried out by the appellant; (c) agreed that the rates for the additional works were to be calculated proportionately; and (d) acquiesced to the appellant's claim for additional works (see para 36).

(2) By the respondent's conduct, the appellant was led to reasonably believe that the strict legal rights would not be insisted on and that it would be paid for the additional works. The absence of written instructions, authorisations or approvals by the parties as stipulated in the LOA was not fatal and would not disentitle the appellant from claiming for the

additional works because the appellant had shown that it had carried out the additional work as instructed by the respondent and the respondent had, by its act, waived the strict requirements under the LOA on variation procedures or had admitted the additional works and promised to pay for the same. In the circumstances, the respondent was estopped from denying its obligation to pay for the additional works. In relation to the pleadings issue, although the word 'waiver' was not used in the statement of claim, nevertheless the appellant had pleaded all material facts which could support a finding on waiver. In addition, the respondent was not taken by surprise as the respondent itself had submitted on the issue of waiver. In the final analysis, the court accepted the appellant's submission that, based on the evidence, the SCJ erred by not imputing an implied promise on the part of the respondent to pay for the additional works, even though the formalities stipulated in the LOA were not fulfilled, as there had been a waiver of the strict requirements under the LOA (see paras 37 & 39–40).

(3) The appellant's claim based on *quantum meruit* was in the alternative, for works performed outside the LOA, in the event that the court found that the additional works were not carried out in accordance with the contractual provisions or that the appellant had failed to prove an oral contract or an implied promise to pay. Extra work may be of the kind contemplated in the clauses of the contract which provided for the ordering of extras. Extra work outside the contract was not governed by the terms of that contract and need not therefore be ordered in writing. A liability to pay for work outside the contract may be found by reference to the principles of unjust enrichment (see paras 44–45).

(4) In view of the above finding, the appellant had fulfilled the conditions for a claim under s 71 of the Contracts Act 1950 and as expounded by the Privy Council in *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118, in that the additional works: (a) were lawful; (b) were done for the respondent; (c) were not intended to be done gratuitously; and (d) were to help the respondent achieve the required structural finished level for the concrete upstand and the appellant had incurred costs in carrying out the additional works, which benefitted the respondent. Therefore, the SCJ was plainly wrong in arriving at the conclusion that the appellant was not entitled to its claim based on *quantum meruit* (see paras 46–47).

[Bahasa Malaysia summary

Pihak-pihak dalam rayuan ini kedua-duanya adalah kontraktor. Melalui surat penerimaan tawaran bertarikh 13 Januari 2014 ('SPT'), responden melantik perayu sebagai sub-kontraktor untuk membekal, menghantar, menguji dan memasang pad galas elastomer berlamina ('kerja-kerja asal'). Perayu telah menyiapkan kerja-kerja asal tersebut dalam tempoh 12 bulan yang ditetapkan.

Selain daripada kerja-kerja asal tersebut, perayu juga telah menyiapkan kerja-kerja tambahan untuk mempateri ketebalan tambahan grout aras susut kekuatan tinggi ('kerja-kerja tambahan'). Walaupun kerja-kerja asal dan kerja-kerja tambahan tersebut telah disiapkan, responden hanya membuat sebahagian bayaran untuk kerja-kerja asal dan gagal membayar bagi kerja-kerja tambahan tersebut, justeru, tindakan perayu terhadap responden di mahkamah sesyen. Perayu berhujah bahawa responden telah mendapat manfaat daripada kerja-kerja tambahan tersebut, oleh itu, perayu berhak untuk dibayar jumlah yang dituntut atau apa-apa amaun lain yang munasabah berdasarkan *quantum meruit*. Responden mempertikaikan tuntutan perayu untuk kerja-kerja tambahan tersebut atas alasan, antara lain, bahawa tiada arahan, kebenaran atau kelulusan bertulis untuk kerja-kerja tambahan tersebut seperti yang ditetapkan di dalam kontrak. Secara khusus, responden berhujah bahawa perayu gagal membuktikan bahawa ia telah mendapat arahan lisan daripada Mohd Zulfikri bin Ghazali, jurutera tapak responden ('Zulfikri'). Oleh itu, responden berhujah bahawa perayu tidak berhak mendapat apa-apa jumlah wang berdasarkan *quantum meruit*. Bagi menyokong tuntutannya, perayu bergantung pada dokumen-dokumen kontemporari berikut: (a) sebut harga perayu kepada responden bertarikh 7 Jun 2013; (b) emel bertarikh 8 Februari 2014; (c) 'Verification of Work Done/Variation Order Work Done Form and Inspection & Test Plan: Installation Of Elastomeric Bearings Form'; (d) emel bertarikh 5 Mei 2015, 5 September 2015, 10 September 2015, 14 Januari 2016, dan 16 Januari 2017; (e) mesyuarat pada 27 Januari 2017 dan surat bertarikh 31 Januari 2017; dan (f) surat tuntutan bertarikh 28 Mei 2020 (secara kolektif dirujuk sebagai 'dokumen-dokumen kontemporari tersebut'). Hakim mahkamah sesyen ('HMS') menolak tuntutan perayu untuk kerja-kerja tambahan berjumlah RM293,182.52 berdasarkan, antara lain, dapatan-dapatan berikut: (i) perayu gagal mematuhi prosedur variasi seperti yang dinyatakan dalam klausa 34 dan klausa 35 SPT; (ii) perayu gagal membuktikan bahawa ia telah mendapat arahan lisan daripada Zulfikri untuk menjalankan kerja-kerja tambahan tersebut dan disebabkan oleh kegagalan untuk memanggil Zulfikri sebagai saksi dalam perbicaraan, mahkamah menggunakan s 114(g) Akta Keterangan 1950; dan (iii) tiada penentuan boleh dibuat mengenai isu penepian iaitu, bahawa responden telah, melalui kelakuannya, mengetepikan keperluan ketat di bawah SPT mengenai prosedur variasi atau telah memperakui kerja-kerja tambahan tersebut dan berjanji untuk membayarnya, kerana ini tidak diplid oleh perayu ('isu pliding'). Terkilan dengan keputusan tersebut, perayu memfailkan rayuan semasa.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM15,000 di sini dan di bawah yang perlu dibayar oleh responden kepada perayu, tertakluk kepada alokatur:

(1) Jika HMS telah menganalisis dengan betul dan menghargai kandungan dan kepentingan dokumen-dokumen kontemporari tersebut, beliau

akan mendapati bahawa dokumen-dokumen ini tidak dinafikan atau dicabar dengan segera dan bersungguh-sungguh oleh responden pada setiap masa yang material, dan bahawa keterangan yang dikemukakan oleh perayu membuktikan bahawa responden telah: (a) mengarahkan perayu untuk menjalankan kerja-kerja tambahan tersebut; (b) mengesahkan dan meluluskan kerja-kerja tambahan yang dijalankan oleh perayu; (c) bersetuju bahawa kadar bagi kerja-kerja tambahan tersebut hendaklah dikira secara berkadaran; dan (d) bersetuju dengan tuntutan perayu bagi kerja-kerja tambahan tersebut (lihat perenggan 36).

(2) Melalui kelakuan responden, perayu telah diyakini secara munasabah bahawa hak undang-undang yang ketat tidak akan ditegaskan dan bahawa ia akan dibayar untuk kerja-kerja tambahan tersebut. Ketiadaan arahan, kebenaran atau kelulusan bertulis oleh pihak-pihak seperti yang ditetapkan dalam SPT tidak membawa kemudaratan dan tidak akan menyebabkan perayu kehilangan hak untuk menuntut kerja-kerja tambahan tersebut kerana perayu telah menunjukkan bahawa ia telah menjalankan kerja-kerja tambahan tersebut seperti yang diarahkan oleh responden dan responden telah, melalui perbuatannya, mengetepikan keperluan ketat di bawah SPT mengenai prosedur variasi atau telah memperakui kerja-kerja tambahan tersebut dan berjanji untuk membayarnya. Dalam keadaan itu, responden telah dihalang daripada menafikan kewajipannya untuk membuat bayaran bagi kerja-kerja tambahan tersebut. Berhubung dengan isu pliding, walaupun perkataan 'penepian' tidak digunakan dalam pernyataan tuntutan, namun perayu telah memplid semua fakta material yang boleh menyokong dapatan penepian. Selain itu, tiada kejutan terhadap responden kerana responden sendiri telah menghujahkan isu penepian. Dalam analisis akhir, mahkamah menerima hujahan perayu bahawa, berdasarkan keterangan, HMS telah terkhilaf apabila tidak mengandaikan janji tersirat di pihak responden untuk membuat bayaran bagi kerja-kerja tambahan tersebut, walaupun formaliti yang ditetapkan dalam SPT tidak dipenuhi, kerana terdapat penepian keperluan ketat di bawah SPT (lihat perenggan 37 & 39–40).

(3) Tuntutan perayu berdasarkan *quantum meruit* adalah dibuat secara alternatif, bagi kerja-kerja yang dilakukan yang skopnya di luar SPT tersebut, sekiranya mahkamah mendapati kerja-kerja tambahan tersebut tidak dijalankan mengikut peruntukan kontrak atau perayu gagal membuktikan kontrak lisan atau janji tersirat untuk membayar. Kerja tambahan mungkin dari jenis yang dimaksudkan dalam klausa kontrak yang memperuntukkan arahan tambahan. Kerja tambahan yang di luar kontrak tidak dikawal oleh terma-terma kontrak tersebut dan oleh itu tidak perlu diarahkan secara bertulis. Liabiliti untuk membayar kerja di luar kontrak boleh didapati dengan merujuk kepada prinsip pengayaan yang tidak adil (lihat perenggan 44–45).

(4) Berdasarkan dapatan di atas, perayu telah memenuhi syarat-syarat untuk tuntutan di bawah s 71 Akta Kontrak 1950 dan seperti yang diterangkan oleh Majlis Privy dalam *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118, iaitu kerja-kerja tambahan tersebut: (a) adalah sah di sisi undang-undang; (b) telah dilakukan untuk responden; (c) tidak bertujuan untuk dilakukan secara percuma; dan (d) adalah untuk membantu responden mencapai tahap siap struktur yang diperlukan untuk binaan konkrit tegak dan perayu telah menanggung kos dalam menjalankan kerja-kerja tambahan tersebut, yang memberi manfaat kepada responden. Oleh itu, HMS secara jelas terkhilaf dalam membuat kesimpulan bahawa perayu tidak berhak kepada tuntutannya berdasarkan *quantum meruit* (lihat perenggan 46–47).]

Cases referred to

Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA; The Leonidas D [1985] 2 All ER 796, CA (refd)

Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd and another appeal [2015] MLJU 2247; [2016] 2 CLJ 563, CA (refd)

Azman bin Mahmood & Anor v SJ Securities Sdn Bhd [2012] 6 MLJ 1, FC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Ch'ng Ghee Weng & Anor v Lee Khoon Eng T/A Prestige Construction [2018] 10 CLJ 189, CA (refd)

Comfort Management Pte Ltd v OGSP Engineering Pte Ltd [2018] 1 SLR 979, CA (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)

EA Technique (M) Sdn Bhd v Malaysia Marine and Heavy Engineering Sdn Bhd and another case [2020] 11 MLJ 353, HC (refd)

Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd [2015] 5 MLJ 411, CA (refd)

Halim bin Saad v Chan Yok Peng [2021] 3 MLJ 717; [2021] 1 CLJ 499, CA (refd)

Kerajaan Malaysia v Ken Reach Builders Sdn Bhd [2020] MLJU 1940; [2020] 1 LNS 1648, CA (refd)

MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428, CA (refd)

MWB Business Exchange Centres Ltd v Rock Advertising Ltd [2018] 2 WLR 1603, SC (refd)

Mahsurimas Sdn Bhd v Ravinder Singh a/l Shangara Singh & Ors [2019] 11 MLJ 281, HC (refd)

Molloy v Liebe (1910) 102 LT 616, PC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)

Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118, PC (refd)

Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin &

Ors [1994] 3 MLJ 185, SC (refd)
Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd [2009] 2 MLJ 546, CA (refd)
The Carbon Co Sdn Bhd & Anor v Ng Lee Hoon (conducting under 'Forest Wood Flooring') [2017] 4 MLJ 791, CA (refd)
Trimis v Mina (2000) TCLR 346, CA (refd)
Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd (1990) 20 NSWLR 251, CA (refd)

Legislation referred to

Contracts Act 1950 s 71
Evidence Act 1950 ss 8, 114(g)
Rules of Court 2012 O 14A, O 33, O 33 rr 2, 5, O 59 r 23

Cheah Kha Mun (Wong Kian Kheong) for the appellant.
Ong Kun Sen (with Victoria Loi) (Shook Lin & Bok) for the respondent.

Aliza Sulaiman J:

INTRODUCTION

[1] This was an appeal by the appellant, the subcontractor who was appointed by the respondent for the sub-package works for the 'Supply, Deliver, Testing & Installation of Laminated Elastomeric Bearing Pads' ('original works') for 'Package S4 — Construction and Completion of Elevated Stations and Other Associated Works at Section 16, Pusat Bandar Damansara and Semantan which is part of the Klang Valley Mass Rapid Transit Project for the Sungai Buloh–Kajang Line ('project'), against part of the decision of the learned sessions court judge ('SCJ') on 16 December 2021 where she:

(a) allowed the appellant's claim for the balance amount for original works in the sum of RM23,137.70 with interest at the rate of 5%pa from the date of registration of the case ie 5 August 2020 until the date of settlement; and

(b) dismissed the appellant's claim for additional works to cast additional thickness of high strength shrink levelling grout ('additional works') in the sum of RM293,182.52.

[2] After perusing the record of appeal ('RoA') and giving due consideration to the oral and written submissions of the parties as well as the clarifications by the learned counsels, Ms KM Cheah for the appellant and Mr KS Ong for the respondent, I had allowed the appellant's appeal. Accordingly, judgment was entered against the respondent for:

A (a) the sum of RM23,138.10 being the balance amount for the original works;

(b) the sum of RM293,182.52 for the additional works;

(c) interest at the rate of 5%pa on the sums as stated in sub-paras (a) and (b) above amounting to RM316,320.62 from 3 December 2014 until full settlement; and

(d) costs of RM15,000 here and below to be paid by the respondent to the appellant, subject to allocatur.

[3] The respondent is dissatisfied with part of my decision in allowing the appellant's appeal in respect of the sum of RM293,182.52 for the additional works with interest thereon and the order as to costs. Hence, the main issue to be addressed in this judgment is whether the SCJ was plainly wrong in dismissing the appellant's claim for additional works.

BACKGROUND FACTS

[4] The appellant is in the business of engineering contractor, contracting and constructing structural works. Its registered address is at F-2–43, Block F, Taipan Damansara 2, Jalan PJU 1A/3, Ara Damansara, 47301 Petaling Jaya, Selangor whilst the business address is at 12A, Jalan SB Jaya 1, Taman Industri SB Jaya, 47000 Sungai Buloh, Selangor.

[5] The respondent carries out business as a civil and earthwork contractor and the hiring of machinery. Its registered address is at 9th Floor, Wisma Naim, 2 1/2 miles, Rock Road, 93200 Kuching, Sarawak and business address is at No A-39–1, Level 39, Menara UOA Bangsar, No 5, Jalan Bangsar Utama 1, 59000 Kuala Lumpur.

[6] By a contract dated 18 May 2021 made between Mass Rapid Transit Corp Sdn Bhd, MMC Gamuda KVMRT (PDP) Sdn Bhd ('PDP') and Sunway Construction Sdn Bhd ('Sunway'), the latter agreed to execute and complete 'Package V4: Construction and Completion of Viaduct Guideway And Other Associated Works From Section 17 To Semantan Portal' ('main contract works').

[7] The 'Form Of Sub-Contract For Nominated Sub-Contractor' was made between Sunway and the respondent on 7 December 2012 ('NSC Form of subcontract') whereby, in consideration of the payments to be made by Sunway to the respondent, the latter covenants to execute and complete the subcontract works or the project in conformity with the provisions of the subcontract.

[8] By the letter of acceptance dated ('LOA') dated 13 January 2014, the respondent appointed the appellant as the subcontractor for the original works for the contract sum of RM260,370.

[9] The subcontract period is 12 months with the commencement date on 2 January 2024 and completion date and handing over on or before 1 January 2015.

[10] Based on the LOA, the appellant's scope of work includes the original works viz:

(a) the supply and delivery of, amongst others, laminated elastomeric bearings pads at the dimension of 356mm x 406mm x 70mm ('bearing pads') including all necessary steel plates, dowels and approved high strength non-shrinkage cement grout ('NSC Grout);

(b) carrying out testing of the bearing pads with issuance of manufacturer compliance certificate; and

(c) installation of bearing pads including casting a layer of NSC bearing pads onto the bearing plinth.

[11] Apart from the original works, the appellant alleged that the respondent had instructed the appellant to carry out the additional works.

[12] According to the appellant, it had carried out and completed the original works and additional works from January 2014 till November 2014 and had issued six progress claims for payment of these Works.

[13] The project was completed in 2016 and the respondent had released the retention sum to the appellant. However, the respondent allegedly only made part payments to the appellant for works which were completed pursuant to the LOA.

[14] In the amended statement of claim ('SoC'), the appellant claimed for the sum of RM322,894.68 with interest and costs. The detailed computation as set out in para 13 of the SoC is re-produced below:

Butir-butir	Jumlah
Kerja-kerja yang disiapkan	RM258,404-00
Tolak: Wang tahanan	RM13,018-50
Tambah: Kerja-kerja Tambahan yang disiapkan	RM293,182-58
Tolak: Pembayaran separa yang dibuat	RM228,691-90
Tambah: Wang tahanan yang dilepaskan	RM13,018-50

Butir-butir	Jumlah
Jumlah yang perlu dibayar dan terhutang oleh Defendan	RM322,894-68

[15] In para 7A of the amended SoC, the appellant pleaded that, as the respondent has benefitted from the additional works, the appellant is entitled to be paid the claimed amount or any other reasonable amount on the basis of *quantum meruit*.

[16] The respondent disputed the appellant's claim for the additional works on the grounds, among others, that there are no written instructions, authorisations or approvals for the purported additional works as contractually stipulated and that the appellant is not entitled to any sums based on *quantum meruit*.

DECISION OF THE SESSIONS COURT

[17] After a full trial, the SCJ decided, among others, to dismiss the appellant's claim for the additional works. The SCJ's analysis and findings in paras 23–52 of her grounds of judgment ('GoJ') are summarised as follows:

(a) the appellant failed to comply with the variation procedures as set out in cll 34 and 35 of the LOA, which require written instruction, authorisation and approval by the authorised person for any variation orders, and thereby was not entitled to claim, and to be paid, for the additional works;

(b) the appellant failed to prove that it had obtained oral instruction from Mohd Zulfikri bin Ghazali, the respondent's site engineer ('Zulfikri'), to carry out the additional works as the appellant did not call Zulkifli as a witness at the trial and the presumption under s 114(g) of the Evidence Act 1950 (Act 56) ('the EA 1950') was invoked;

(c) the appellant's contention that the email dated 8 February 2014 from Zulfikri to the appellant ('8 February 2014 email') refers to the specifications for the additional works is inconsistent with the evidence given by DW1, who was the respondent's land surveyor for the project, and DW2 and the contemporaneous documents; moreover the 8 February 2014 email contains a disclaimer;

(d) the 'Inspection & Tsst Plan Forms — Installation of Elastomeric Bearings' are in relation to the inspection of bearing pads under the original works and not for the additional works;

(e) no determination can be made on the issue of waiver ie that the respondent had, by its conduct, waived the strict requirements under the

LOA on variation procedures or had admitted the additional works and promised to pay for the same, as this was not pleaded by the appellant;

(f) Zulfikri was not authorised to give any variation order or to waive the variation procedures;

(g) some of the facts as submitted by the respondent are contained in the amended defence whilst other facts are only description of the details which are immaterial or evidence in support of the issues and do not need to be pleaded. On the other hand, the facts as submitted by the appellant have to be pleaded;

(h) the appellant's submission that the respondent did not protest or object to the contemporaneous documents at all material times until the dispute arose is baseless;

(i) the identity of the third party who is actually responsible to build the plinths at the Pusat Bandar Damansara station is immaterial and does not affect the other evidence which shows that the appellant did not carry out or complete the additional works;

(j) the as-built drawings are contemporaneous documents and the maker, DW1, is an independent witness who gave evidence on these drawings. The appellant failed to elicit evidence from DW1 that these drawings are false or created for the trial. The as-built drawings are given high probative value; and

(k) the appellant is not entitled to claim and to be paid on the basis of *quantum meruit* as there is an existing contract between the parties to pay an agreed sum.

THE MEMORANDUM OF APPEAL

[18] The amended memorandum of appeal listed 14 grounds of appeal in respect of the SCJ's decision on the additional works. Basically, the appellant claimed that the SCJ had erred in law and/or in fact when she made the determinations as stated in sub-paras 17(a) to (k) above.

[19] With regards to the SCJ's decision on interest, the appellant asserted that the SCJ had erred in law and/or in fact when she failed to conclude that interest at the rate of 5%pa on the sums due and owing should be calculated from 3 December 2014, which is 30 days from the date of Progress Claim No 6 ('PC No 6'), and not from the date of registration of the case, until full and final settlement.

A THE LEGAL PRINCIPLES

[20] The appellant's counsel cited the decisions by the appellate courts in *Azman bin Mahmood & Anor v SJ Securities Sdn Bhd* [2012] 6 MLJ 1 (FC), at paras 24 and 25, p 12), *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 (FC), at para 60, p 464) and *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428 (CA), at para 17, p 437) for the well-established legal principles on appellate intervention.

[21] These legal principles and the history on the operation of the 'plainly wrong' test is well captured in the judgment which was chosen by the respondent's counsel for purposes of the present appeal as delivered by Zabariah Yusof FCJ for the apex court in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67. It is settled law that an appellate court will not intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no, or insufficient, judicial appreciation of evidence. If, in arriving at the decision, it could not reasonably be explained or justified and the decision of the trial court is one which no reasonable judge could have reached, the decision is susceptible to appellate intervention. The plainly wrong test is not intended to be used by the appellate court as a means to substitute its own decision for that of the trial court on the facts (see pp 81–96 of the law report, especially paras 62–78).

ANALYSIS AND FINDINGS OF THE COURT

[22] Although in the written submission to this court, the appellant framed seven main issues in respect of the appeal as to the claim for the additional works, some of these issues are inter-related and will be addressed together in the discussion on the contemporaneous documents:

First issue: Whether the SCJ had erred in law and/or in fact when she found that the appellant failed to comply with the contractual provisions for variations

Second issue: Whether the SCJ had erred in law and/or in fact when she held that the appellant failed to prove that it had carried out and completed the additional works and thereby dismissed the appellant's claim for the same

Third issue: Whether the SCJ had erred in law and/or in fact when she found that the appellant failed to prove the alleged oral instruction to carry out the additional works by not calling Zulfikri as a witness

Fourth issue: Whether the SCJ had erred in law and/or in fact when she found that the issue of waiver was not pleaded by the appellant

Fifth issue: Whether the SCJ had failed to direct herself to the legal principle that evidence on material facts not pleaded must be disregarded and rejected

[23] Clauses 34 and 35 of the LOA govern the pracedure for 'VARIATION ORDERS' in these words:

> 34. HESB shall comply and execute all variation orders issued in writing by NESB Project Manager and approved by NESB Project Director.
>
> 35. All Claims for variation orders and/or associated claims by HESB in connection with the changes in the construction drawings shall be on a 'back to back' basis subject to the approval of the WPC and PDP. HESB shall note that Clause 19 related to Variation in the Form of Subcontract for Nominated Subcontractor between NESB and WPC shall be applicable to this Contract.

[24] Clause 19 of the NSC Form of subcontract reads:

> (a) The Nominated Sub-Contractor shall comply with and carry out any variations required or authorized in writing by the Works Package Contractor and approved by the PDP. Save as aforesaid, no variation of the Sub-Contract Works shall be made or allowed by the Nominated Sub-Contractor.
>
> (b) The expression 'variation' shall have the same meaning assigned to it as in the Main Contract.

[25] It was the respondent's case at the trial that the appellant had failed to comply with the above-quoted clauses as there was no written instruction or approval from the respondent's project manager and project director and the additional works were not authorised or approved by PDP and Sunway as the works package contractor. Further, even if Zulfikri had instructed the appellant to carry out the additional works, he was not authorised to give such instruction as he was not the project manager or project director.

[26] With regards to the 8 February 2014 email where Zulfikri wrote 'Attached herewith the table of R, L top bearing as per requested', the respondent submitted that it did not state that Zulfikri had instructed the appellant to carry out the additional works.

[27] In paras 23–26 of the GoJ, the SCJ accepted the respondent's submissions by citing the case authority of *Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd* [2015] 5 MLJ 411 (CA) to support her finding that the variation procedures as set out in cll 34 and 35 of the LOA must be given their literal meaning and be strictly complied with, and as the appellant failed to prove there was such compliance, its claim for the additional works cannot be allowed. The SCJ opined that this conclusion is the same even if the appellant had carried out the additional works as alleged.

[28] I have perused the record of appeal and considered the oral and documentary evidence and the parties' submissions before the SCJ and the submissions and clarifications before me in my appellate capacity, and in my view, the SCJ erred in law and in fact when she failed to conclude that the absence of written instruction, authorisation or approval by the persons stated in the LOA is not fatal and will not disentitle the appellant from claiming for the additional works. My reasons are elaborated below.

[29] In *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979, a similar argument was put forth in that the contract provided for a strict and detailed contractual mechanism for the approval and valuation of variations, and the party claiming for payment for variation works must prove that a written notice for such works had been given and a written approval had been issued to carry out such works. However, the Singapore Court of Appeal held that:

> 89 We did not accept this submission. We recognise that standard form construction contracts, which may be said to reflect industry practice, generally require variations in the contract to provide for a change in the scope of construction work contemplated to be effected in writing. *However, it is not invariably the case that the absence of writing, or more generally, the failure to follow the prescribed procedure, will disentitle the party who has performed the variation works from claiming payment for those works.* Thus it is said in Chow Kok Fong, Law and Practice of Construction Contracts, vol 1 (Sweet & Maxwell, 4th Ed, 2012) at para 5.25:
>
> > The effect of contractual provisions such as those cited here is that, except for situations which have been specifically exempted, a written variation order serves as a condition precedent for payment of the variation work. If a contractor ignores the requirement for a written variation order, as a general principle, he cannot be found to complain subsequently if he is not paid for the varied work, nor can he contend that he should be paid a reasonable sum for the work merely on the premise that the employer had the benefit of the variation work. *However, in a suitable situation, the employer may be estopped by his conduct from denying liability to pay notwithstanding the non-compliance with the formalities stipulated in the contract.*
>
> 90 *This passage suggests that the absence of documents that demonstrate formal compliance with the contractually prescribed procedure for variation works is not necessarily fatal to a claim for variation works.* That gives the impression that such absence does not inexorably translate into a patent error in the payment claim. All it means is that *the contractor bears the risk of proving that the variation was ordered by the employer in the absence of a written variation order. This observation finds support in the position in English law on this issue, which is that a term of a contract which states that the contract can only be varied in writing will not prevent there being an oral variation; instead, the effect of such a term is at best to raise a rebuttable presumption that, in the absence of writing, there has been no variation:* Sean Wilken QC & Karim Ghaly, The Law of Waiver, Variation, and Estoppel (Oxford University Press, 3rd Ed, 2012) at p 26 fn 131, citing the English Court of Appeal's decision in *I-Way Ltd*

v World Online Telecom UK Ltd [2002] EWCA Civ 413 (see [11]–[12] per Sedley LJ and [17] per Schiemann LJ); see also the English Court of Appeal's decision in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553 at [34] per Kitchin LJ.

[30] The respondent's counsel submitted that the case of *Comfort Management* should be confined to its own facts whereby the judgment was made in the context of a review of the adjudicator's decision. In my opinion, this argument rings hollow. An explication of the general principles of law is relevant and applicable irrespective of whether these are made in a civil suit concerning adjudication proceedings and an adjudicator's decision.

[31] In fact, in *Law And Practice of Construction Contracts* (5th Ed, Volume 1, Sweet & Maxwell, 2018), the learned author Chow Kok Fong illuminated that, a few weeks after the decision in *Comfort Management*, the United Kingdom Supreme Court in the case of *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] 2 WLR 1603, which concerns a licence agreement for the use of office space and contained a 'no oral modification' ('NOM') clause that variations to the licence must be agreed and set out in writing before they take effect, held that the NOM clause should be given its full effect ie to permit a variation to the contract only in accordance with the terms of the clause, subject to a party being able to establish para 5.031, pp 303–304).

[32] In paras 5.032 and 5.037, pp 304 and 306, the learned author further stated that:

> 5.032 Lord Sumption considered that where a party had acted on an oral variation notwithstanding the existence of a NOM clause, the safeguard against injustice under English law lies in the various doctrines of estoppel. However he added the requirements on which such reliance on an estoppel should be predicated on some unequivocal words or conduct evincing a valid agreement to vary.
>
> > ... the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself ...
>
> *Recovery without Written Orders*
>
> Implied Promise to Pay
>
> 5.037 In certain circumstances, *the courts may be prepared to impute an implied promise on the part of the employer to pay for work which has not been ordered in accordance with the formalities stipulated in the contract conditions. A situation which warrants such an imputation is where the employer has done some act suggesting that he is waiving the condition precedent, and which has the effect of leading the contractor 'reasonably to believe that the strict legal rights will not be insisted on'.* In *Molloy v Liebe*

(1910), the employer ordered the contractor to execute a certain item of work. The contractor argued that this was extra work. The employer maintained that the work was not an extra and insisted that the contractor carry out the work. The matter was referred to arbitration. In an award which was subsequently upheld in court, the arbitrator ruled that the work was indeed, as the contractor claimed, extra work and that *the employer had, by his insistence that work should be done, impliedly promised the contractor that the work would be paid for. It was considered immaterial in the circumstances that the subject work was not ordered in writing in accordance with the procedures stipulated under the terms of the contract.* (Emphasis added.)

[33] In *Keating on Construction Contracts* (10th Ed, Sweet & Maxwell, 2016) by Stephen Furst and The Hon Sir Vivian Ramsey the esteemed authors had elucidated at pp 110–111 on implied promise on the part of an employer to pay for work which was not instructed in accordance with the formalities stipulated in the contract conditions in these terms:

> *When there is a condition in the contract that extras shall not be paid for unless ordered in writing* by the architect and *the employer orders work which they know, or are told, will cause extra costs there may be an implied promise by the employer that the work should be paid for as an extra and especially so in cases where any other inference from the facts would be to attribute dishonesty to the employer.*
>
> *Such a promise may be implied where there has been a waiver of the condition. In order to constitute a waiver there must be conduct which leads to other party reasonably to believe that the strict legal rights will not be insisted on. Thus, in principle, a written waiver by the employer would be effective, and even an oral waiver would be sufficient if it were a clear undertaking not to rely on the condition.*
>
> Where a contractor maintained that certain work was extra work but the employer said that it was not and insisted on the work being done, the court upheld an arbitrator's award that work was extra work and that a promise was to be inferred on the part of the employer to pay for it if it should be found to be extra work. *Although the work was not ordered in writing as an extra in the manner required by the contract, the court said that it was difficult to see how any other inference could have been drawn without attributing dishonesty to the employer …* (Emphasis added.)

(The footnote to the last sentence as above quoted refers to the case authorities of *Molloy v Liebe* (1910) 102 LT 616 (High Court of Australia), *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251 (New South Wales Court of Appeal) and *Trimis v Mina* (2000) TCLR 346 (New South Wales Court of Appeal).)

[34] In *EA Technique (M) Sdn Bhd v Malaysia Marine and Heavy Engineering Sdn Bhd and another case* [2020] 11 MLJ 353 at p 380, the High Court, in finding that the additional works to be carried out ('AWO') were properly issued pursuant to the contract and is hence an adjudicatable issue within the core and/or contingent jurisdiction of the adjudicator in the adjudication proceedings, said that:

> [44] There were many AWO issued for changes or variations during the performance of the contract (which led to the eventual conflict or dispute between the parties). Upon their issuance as instructed by EAT, I however find that *EAT did not raise objection to the contents of the AWO at all material times on their issuance that they were not in accordance with the procedure in article 13 of the conditions of contract save only on its qualification on the price and costs stated therein. It must thus be deemed that EAT had waived, acquiesced or accepted that they were issued pursuant to the contract. Accordingly, EAT is also estopped from insisting on strict compliance of article 13 of the conditions of contract.* (Emphasis added.)

(See too *Mahsurimas Sdn Bhd v Ravinder Singh a/l Shangara Singh & Ors* [2019] 11 MLJ 281 at paras 93–95, pp 304 and 305 where the High Court allowed the plaintiffs claim for variation works as the defendants have, by their conduct, waived their right to insist on written instruction for variation.)

[35] At the court below, the appellant contended that it has discharged the burden of proving, on a balance of probabilities, that the additional works were ordered by the respondent in the absence of a written variation order by the respondent's project manager and approved by the project director, based on contemporaneous documents. I have scrutinised the contemporaneous documents and my analysis is as follows:

(a) the appellant's quotation to the respondent dated 7 June 2013:

In this quotation amounting to RM260,370, there is a statement that '1) If the actual plinth thickness is more than 25mm, the rate shall be charged proportional based on the volume'. Based on cl 2 of the LOA, this quotation is one of the letters between the parties which shall constitute a binding contract between them;

(b) 8 February 2014 email:

(i) PW1 had explained the facts which led to the issuance of the 8 February 2014 email during re-examination. PW1 testified that on the day in question, the appellant was supposed to cast the original works of 20mm to 25mm plinths in height, but they discovered that there were no upstand plinths (see too, the Notes of Evidence in the Record of Appeal, Vol 2A, encl 4, pp 104–111 where PW1 explains the drawing he made during the trial which was marked as exh P3 (record of appeal, Vol 2D, encl. 7, p 1149) to show the upstand plinth, grout and bearing for the original works and additional works);

(ii) Zulfikri then requested the appellant, through PW1, to cast the upstand plinth as additional work. The words 'as per requested' in the 8 February 2014 email are said to refer to the respondent's request to the appellant to carry out the additional works;

(iii) the 8 February 2014 email was also copied to Wan Mohd Izzudin bin Wan Ibrahim, the respondent's manager, who did not at any time,

A inform the appellant that Zulfikri was not authorised to give any instruction or request for variation order and nor to send the 8 February 2014 email;

(iv) one of the grounds of appeal was that the SCJ had erred in law and fact B when she drew an adverse inference against the appellant for not calling Zulfikri as a witness. The respondent submitted that it is the appellant's contention that the instruction to carry out the additional works were given by Zulfikri via the 8 February 2014 email. However, the appellant's case was that Zulfikri gave the oral instruction to PW1 to C perform the additional works and this instruction was then recorded in the 8 February 2014 email where Zulfikri had attached a document setting out the specifications of the additional works.

PW1 had given evidence that he received the instruction from Zulfikri. Moreover, PW1 was the Operation Manager and actively involved in the D project by being present at the site when the original works and the additional works were carried out. The 8 February 2014 email was sent to PW1 who understood the context of the same.

In view of PW1's evidence, and the contemporaneous documents which support the appellant's claims for additional works, as shall be further E elaborated, the evidential burden then shifts to the respondent to prove otherwise. I accept the appellant's submission that in the circumstances of the case, the appellant is not required to present Zulfikri as a witness and the SCJ was plainly wrong in her decision in paragraph 29 of the GoJ in drawing an adverse inference against the appellant under s 114(g) F of the EA 1950.

There is a final point to be dealt with in relation to the 8 February 2014 email and it is this; the respondent had submitted that the 8 February 2014 email contains a disclaimer that the contents of the same is not binding on the respondent unless it was issued by an authorised person. G The SCJ was persuaded by this submission.

The disclaimer in the 8 February 2014 email appears to be a standard disclaimer for all emails sent by the respondent to any recipient ie that the email is confidential and legally privileged and what a person who has H received the email in error should do, including the statement that the contents of the email are not binding on the respondent unless the contents is subsequently confirmed in writing by an authorised person. In my considered view, the SCJ had erred by relying on the disclaimer as a reason to support her findings and conclusion and not giving sufficient I weight to the oral and documentary evidence as a whole;

(v) the SCJ had also erred in preferring DW2's evidence on the meaning of the 8 February 2014 email (see paras 30 and 31 in the GoJ) as opposed to PW1's evidence for the reasons as put forth by the appellant in para 21 of the written submission. Basically, DW2 had no personal knowledge

of the contents of the 8 February 2014 email as he was not involved in the project, he was not copied in the 8 February 2014 email and his name does not appear in any of the documents which were produced for the trial;

(vi) as for the SCJ's finding in paras 32–34 of the GoJ that DW2's evidence was corroborated by DW1's evidence, the SCJ failed to appreciate that the respondent, through its witnesses, had attempted to introduce facts and defences which were not pleaded in the amended defence.

A scrutiny of the amended defence clearly shows that the respondent's main defence was that there are no written instructions, authorisations and approvals as required under the LOA. However, during the trial, among the new defences raised through the respondent's witnesses, are:

(1) the casting of grout plinths at SBP01, SPB02 and SPB05 was within Sunway's scope work while the respondent was only responsible for SPB03 and SPB04;

(2) the casting of grout plinths was completed by Sunway before the appellant installed the bearing pads. Based on the readings taken on site, DW1 had prepared the as-built drawings in February and March 2014. Based on the as-built bearings plinths level made by DW1, the plinths for SPB01, SPB02, SPB04 and SPB05 were constructed by other contractors on 2 February 2014 ie before the appellant entered into the project site. Therefore, it is impossible for the appellant to have carried out the additional works in April 2014;

(3) there was no inspection or verification of the additional works by the respondent before the verification of work done/variation order work done forms were signed by the respondent; and

(4) the appellant made a false claim for the additional works.

It is trite that material facts must be pleaded. This is to prevent the opposing party from being taken by surprise by evidence which departs from the pleaded case (see *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 (PC) and *The Carbon Co Sdn Bhd & Anor v Ng Lee Hoon (conducting under 'Forest Wood Flooring')* [2017] 4 MLJ 791 (CA) and the plethora of cases cited therein). The fact that the appellant was taken by surprise is demonstrated by the objections raised by the appellant's counsel at the trial whenever the respondent attempted to bring in evidence as to facts which were not pleaded (see sub-para 2(b) of the appellant counsel's letter to the court dated 21 June 2022 (encl 21) in respond to my questions during the clarification session on the objections made by the appellant's counsel as recorded in the notes of evidence).

In this regard, the SCJ found, among others, that DW1 is an

A independent witness, the as-built drawings are contemporaneous documents and the appellant failed to elicit evidence from DW1 that these drawings are false. Hence, the SCJ gave high probative value to the as-built drawings and rejected the appellant's submission that the respondent produced the draft and official as-built drawings a mere
B two weeks before the trial commenced and that this issue was never pleaded by the respondent in its amended defence. The SCJ was plainly wrong in failing to recognise the fundamental rules on pleadings.

C (c) Verification of Work Done/Variation Order Work Done Form and Inspection and Test Plan: Installation Of Elastomeric Bearings Form ('said forms'):

PC No 6 dated 3 November 2014

D The said forms show that Zulfikri had signed the same and affixed the company stamp on 8 April 2014 in the column meant for the respondent's verification and approval of the additional works carried out, namely, casting grout plinths at the thickness of 75mm or 100mm at 130 beams at the Pusat Bandar Damansara Station (SPB 01 UC, SPB 02 DC, SPB 02 UC, SPB 03 UC, SPB
E 04 DC, SPB 04 UC dan SPB 05 DC).

The respondent contended that Zulfikri was not authorised to verify and approve the additional works. In his evidence, DW2 even insinuated that anyone can buy the company stamp. However, he later admitted in
F cross-examination that no police report was lodged against Zulfikri for using the company stamp without authority.

In the submissions before this court, Mr KS Ong argued that the SCJ's findings on, among others, the credibility of the witnesses (mainly PW1 and DW1, in the light of the alleged contradictions in PW1's testimony as to who took the
G measurements and prepared the Verification of Work Done/Variation Order Work Done Form; see paras 31–45 of the respondent's Written Submissions) should not be interfered with as the SCJ had the benefit of observing the demeanor of the witnesses.

H Whilst the legal principle that an appellate court should not interfere with the conclusions by the trial court on primary facts due to, among others, the fact that the trial judge was in the privileged position to assess the credibility of the witnesses' evidence (see *Ng Hoo Kui*, at para 68, pp 93–94), however, in this case, the SCJ failed to appreciate the entire evidence which was adduced at the
I trial.

When cross-examined, DW2 agreed that the Said Forms were sent to the respondent together with PC No 6 in November 2014. A perusal of PC No 6 shows that the appellant had claimed the sum of RM293,182.58 as 'Variation Orders — Casting Bearing Up Stand Plinth' and the supporting documents

were included as 'Appendix A'. Turning to 'Appendix A', it contains details such as the location, original dimension, as-built dimension, variation in the dimension, the rates charged and the computation for the total amount claimed for variation orders.

If indeed the respondent did not instruct the appellant to carry out the additional works as alleged, it is reasonable to expect that the respondent would have raised the issue about Zulfikri's scope of authority and protested to PC No. 6 and the said forms since November 2014. However, the respondent did not deny that it had instructed the appellant to carry out the additional works and that the additional works were carried out by the appellant. There was no correspondence or communication whatsoever at the material time. It was only in the respondent's letter to the appellant dated 24 April 2019 regarding the Final Account that the respondent said '(2) We not received any official Variation Order Claim from you. Kindly refer to the Term and Conditions of our Letter of Acceptance Clause 34 and 35 of the Variation Orders'.

Furthermore, in preferring DW1's evidence over PW1 's, the SCJ failed to appreciate that DW1's evidence on the party which was in charge of the plinths at the relevant locations and other contractors who had already constructed the plinths at several locations, was on facts, and an attempt by the respondent to introduce defences, which were not pleaded in the amended defence.

(d) emails dated 5 May 2015, 5 September 2015, 10 September 2015, 14 January 2016 and 16 January 2017:

In the email dated 5 May 2015, the respondent requested for the key plan/drawing, progress photo, breakdown and measurement sheet of the variation order in softcopy in Excel file and all supporting documents from the appellant.

The respondent repeated the request vide the email dated 5 September 2015 to the appellant viz for the key plan/drawing, progress photo and all supporting documents prior to processing of the claim.

There is no document to show that the appellant had responded to the two abovesaid emails. Nevertheless, the respondent did not pursue the request for the previously mentioned documents and instead on 10 September 2015, the respondent sent another email stating, among others, 'Regarding PC no 6 which is Variation Order, We require you to forward to us the Built up rate breakdown for the grout as well'.

The appellant replied by the email dated 14 January 2016 attaching the 'Summary of Delivery Order', 'Delivery Order signed by WPC' and 'Cost justification for plinth grouting VO and mentioning that 'Should you require further information/queries, please do not hesitate to contact us'. The respondent did not send any requests for documents to the appellant after that date.

On 16 January 2017, the respondent sent an email to the appellant to discuss the 'VO's rate'.

(e) Meeting on 27 January 2017 and letter dated 31 January 2017:

Following the meeting on 27 January 2017, the appellant wrote to the respondent on 31 January 2017 ('31 January 2017 letter') to record, among others, as follows:

> ...
>
> It was indeed a great meeting we had last Friday 27.01.2017. We are glad that the issues are now clarified as follow:
>
> 1. The additional grouting works are proportionally calculated as variation order under clause 2 (C) of binding contract ref: ...
> 2. The additional thickness were indeed required to match the structural finished level on top of bearings.
> 3. All additional grouting works were verified and the Inspection Test Plan (ITP) were duly signed by your authorized manager.
>
> We therefore would appreciate that you expedite the payment process as this account is long overdue.
>
> ...

(see too, PW2's evidence regarding the meeting).

The respondent did not deny the contents of the 31 January 2017 letter and nor was the same challenged during cross-examination of the appellant's witnesses. Based on the positive note in the 31 January 2017 letter, it would be fair to say that the appellant held the believe that it would be paid for the additional works; and

(f) letter of demand dated 28 May 2020 ('LoD'):

The appellant's solicitors had issued the LoD to the respondent upon being instructed that the respondent had requested the appellant to carry out additional grouting works and that these works were completed. The sum of RM322,894.68 was demanded to be paid within seven days.

The respondent did not reply to the LOD. This is fatal to the respondent because, as a business entity, it would surely be aware of the grave implications by not responding to a legal letter. This failure to respond goes to conduct under s 8 of the EA 1950. Conduct is a relevant fact for the court to consider in giving the relevant probative force to the version of one party or the other party (see *Halim bin Saad v Chan Yok Peng* [2021] 3 MLJ 717; [2021] 1 CLJ 499 (CA) at paras 44–47, pp 738–739 (MLJ); pp 519–521 (CLJ)).

[36] If the SCJ had properly analysed and appreciated the contents and significance of the contemporaneous documents as outlined above, she would

have found that these documents were not promptly and vigorously denied or challenged by the respondent at all material times, and that the evidence adduced by the appellant proves that the respondent had:

(a) instructed the appellant to carry out the additional works;

(b) verified and approved the additional works carried out by the appellant;

(c) agreed that the rates for the additional works are to be calculated proportionately; and

(d) acquiesced to the appellant's claim for additional works.

[37] By the respondent's conduct, the appellant was led to reasonably believe that the strict legal rights will not be insisted on and that it would be paid for the additional works. The absence of written instructions, authorisations or approvals by the parties as stipulated in the LOA is not fatal and will not disentitle the appellant from claiming for the additional works because the appellant had shown that it had carried out the additional works as instructed by the respondent and the respondent had, by its act, waived the strict requirements under the LOA on variation procedures or had admitted the additional works and promised to pay for the same. In the circumstances, the respondent is estopped from denying its obligation to pay for the additional works (see *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331).

[38] The respondent had contended that the issue of waiver was never pleaded by the appellant in the SoC and in any event, the respondent never waived the requirements under cll 34 and 35 of the LOA as a waiver can only be given by an authorised person. Zulkifli is not an authorised person. Thus, the 8 February 2014 email and the Verification of Work Done/Variation Order Work Done Forms which were signed by Zulfikri do not amount to a waiver. In paragraph 38 of the GoJ, the SCJ took the view that no determination can be made on the issue of waiver as this was not pleaded by the appellant.

[39] Although the word 'waiver' is not used in the SoC, nevertheless the appellant had pleaded all material facts which could support a finding on waiver. In addition, the respondent was not taken by surprise as the respondent itself had submitted on the issue of waiver, among others with reference to the case of *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA; The Leonidas D* [1985] 2 All ER 796 that silence does not amount to a waiver, in sub-para 30(d) of its reply submission dated 18 January 2021 in its application which was filed on 26 November 2020 pursuant to O 14A and O 33 rr 2 and 5 of the Rules of Court 2012 ('the RC 2012') the respondent's appeal in Civil Appeal No WA-12AC-9–02 of 2021, against the decision of the SCJ in dismissing its application, was dismissed by this court on 24 May 2021).

[40] In the final analysis, I accept the appellant's submission that, based on the evidence, the SCJ erred by not imputing an implied promise on the part of the respondent to pay for the additional works, even though the formalities stipulated in the LOA were not fulfilled, as there has been a waiver of the strict requirements under the LOA.

Sixth issue: Whether the SCJ had erred in law and/or in fact when she decided that quantum meruit is not applicable

[41] The SCJ was persuaded by the respondent's defence, on the authority of *Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd* [2009] 2 MLJ 546 (CA) that the appellant is not entitled to claim, and to be paid, on the basis of *quantum meruit* as there is an existing contract between the parties to pay an agreed sum (see paras 46–48 of the GoJ).

[42] In this appeal, the respondent drew support from other judgments by the Court of Appeal, namely, *Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd and another appeal* [2015] MLJU 2247; [2016] 2 CLJ 563, *Ch'ng Ghee Weng & Anor v Lee Khoon Eng T/A Prestige Construction* [2018] 10 CLJ 189 and *Kerajaan Malaysia v Ken Reach Builders Sdn Bhd* [2020] MLJU 1940; [2020] 1 LNS 1648 in submitting that the appellant's claim based on the principle of *quantum meruit* cannot be invoked to override the express provisions under cll 34 and 35 of the LOA.

[43] However, what the SCJ failed to appreciate was that the appellant relied on the following excerpt in the judgment in *Syarikat Binaan Utara Jaya* at pp 561–562) in advancing the argument on *quantum meruit* (see para 67 in the appellant's Written Submission after the trial in the record of appeal, Vol 2E, encl 8, pp 1238–1240):

> [40] However, there may be a quantum meruit claim in the following situations:
>
> ...
>
> (d) when work is performed outside a contract (thus, in a situation where there is a contract for specified work but the contractor does work outside the contract at the employer's request the contractor is entitled to be paid a reasonable sum for the work outside the contract on the basis of an implied contract (*Alexander Thorn v The Mayor and Commonalty of London* (1875-1876) LR 1 App Cas 120 at p 127(HL); *Parkinson (Sir Lindsay) & Co Ltd v Commissioners of Works* [1949] 2 KB 632 (CA); *Greenmast Shipping Co SA v Jean Lion Et Cie SA (The 'Saronikos')* [1986] 2 Lloyd's Rep 277 and *Cana Construction Co v R* [1974] SCR 1159 37 DLR (3d) 418, Supreme Court of Canada);
>
> ...

> [41] ... A claim in quantum meruit would be made on the basis that the respondent employer had derived a benefit from the work done by the appellant contractor and; if this is so, a reasonable remuneration has to be paid to the contractor.

[44] In other words, the appellant's claim based on *quantum meruit* was in the alternative, for works performed outside the LOA, in the event that the court found that the additional works were not carried out in accordance with the contractual provisions or that the appellant has failed to prove an oral contract or an implied promise to pay.

[45] Extra work may be of the kind contemplated by clauses of the contract which provide for the ordering of extras. Extra work outside the contract is not governed by the terms of that contract and need not therefore be ordered in writing. A liability to pay for work outside the contract may be found by reference to the principles of unjust enrichment (see *Keating on Construction Contracts*, at pp 111 and 112).

[46] Seen in this light, the appellant has fulfilled the conditions for a claim under s 71 of the Contracts Act 1950 (Act 136) and as expounded by the Privy Council in *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118 in that the additional works:

(a) are lawful;

(b) were done for the respondent;

(c) were not intended to be done gratuitously as exemplified by the issuance of PC No 6 and the email dated 16 January 2017; and

(d) the additional works were to help the respondent to achieve the required structural finished level for the concrete upstand. The appellant had incurred costs in carrying out the additional works, which benefited the respondent.

[47] Therefore, the SCJ was plainly wrong in arriving at the conclusion that the appellant was not entitled to its claim based on *quantum meruit.*

CONCLUSION

[48] Premised on all the aforesaid considerations, the appellant's appeal was allowed and judgment was entered against the respondent for, among others, the sum of RM293,182.52 for the additional works and interest at the rate of 5%pa from 3 December 2014 (30 days from the date of PC No 6) until full settlement.

A **[49]** On the issue of costs, Ms KM Cheah prayed for costs of RM20,000 here and below in view of the duration of five days of trial, the total judgment sum of RM316,320.62 which was awarded by this court and costs in the cause for two interlocutory applications (pursuant to O 14A and O 33 of the RC 2012 and for a stay which were all dismissed by the SCJ).

B

[50] Mr KS Ong proposed costs of RM10,000 as the amount in dispute is not high, nevertheless counsel acknowledged that considerable work and research were carried out.

C **[51]** I had considered O 59 r 23 of the RC 2012 on the scale of costs for trial in the subordinate courts and the submissions by the learned counsels before exercising my discretion in ordering costs of RM15,000 here and below to be paid by the respondent to the appellant, subject to allocatur.

D *Appeal allowed with costs of RM15,000 here and below to be paid by respondent to appellant, subject to allocatur.*

Reported by Dzulqarnain Ab Fatar

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